No. 9194

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

5

In the Matter of
ADRIEN BLANQUIE,
doing business as City of Paris Dyeing & Cleaning Works,
Bankrupt.

JOHN O. ENGLAND, Trustee in Bankruptcy of the Estate of Adrien Blanquie, doing business as City of Paris Dyeing & Cleaning Works,
Appellant,

vs.

M. DUCASSE,
Appellee.

NOTICE OF MOTION TO DISMISS APPEAL.

MOTION TO DISMISS APPEAL.

POINTS AND AUTHORITIES IN SUPPORT OF APPELLEE'S MOTION TO DISMISS APPEAL.

BRIEF FOR APPELLEE.

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Appellee.

NOTICE OF MOTION TO DISMISS APPEAL.

To John O. England, Trustee in Bankruptcy of the Estate of Adrien Blanquie, doing business as City of Paris Dyeing & Cleaning Works; and to Grant H. Wren, Esq., and James M. Connors, Esq., his attorneys:

You and each of you will please take notice that the above named appellee, M. Ducasse, will move the

above entitled Court to dismiss appellant's appeal herein at the time that said appeal is called for hearing before the above entitled Court or as soon thereafter as counsel can be heard and that said motion will be made and based on all the papers, records and files herein including this notice of motion to dismiss appeal, said motion to dismiss appeal, and statement of facts and points and authorities therein.

Dated, San Francisco,
September 15, 1939.

STANLEY JACKSON,
WERNER OLDS,
BERTRAND A. BLEY,
Attorneys for Appellee.

ROBERT E. HALSING,
Of Counsel.

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Appellee.

MOTION TO DISMISS APPEAL.

STATEMENT OF FACTS.

M. Ducasse, doing business as West Coast Laundry Machinery Company, filed a petition for reclamation in the above bankruptcy proceedings based on a conditional sales contract entered into between him and the said bankrupt. In the course of the hearing on

said petition, held before Hon. Burton J. Wyman, Referee in Bankruptcy, on September 14, 1938, said M. Ducasse sought to introduce testimony to explain the figures and entries and the import of the figures and entries appearing on the ledger sheets of said M. Ducasse, introduced in evidence, and to explain the circumstances under which said entries were made, and the matters to which said entries related, and to show that the said ledger sheets in relation to said conditional sales contract would show by said explanation and testimony that there was due to said M. Ducasse the sum of $2273.83, and not the sum of $427.57, which said last named figure was the last figure appearing on said ledger sheets.

Said Burton J. Wyman, Referee in Bankruptcy, refused to allow said M. Ducasse to introduce such, or any, oral testimony, affecting, or in any way pertaining to said items appearing in said ledger sheets, and for the purpose of showing that the sum of $2273.83, and not the sum of $427.57 was due, owing and unpaid by said bankrupt to said M. Ducasse on said conditional sales contract.

Burton J. Wyman, said Referee, made his order on September 14, 1938, in said bankruptcy proceedings, ordering, adjudging and decreeing that there was due to said M. Ducasse in reclamation the sum of $427.57, and no more.

Thereafter, and on September 23, 1938, said M. Ducasse filed in said bankruptcy proceedings his petition to review Referee's said order.

Thereafter, the Honorable District Judge Harold Louderback made the following order (Tr. 41):

> "As prayed for in the Petitioner's Petition for Review, it is ordered that this case be, and is hereby re-referred to the Referee in Bankruptcy for further hearing and for determination of the application of M. Ducasse (doing business as West Coast Laundry Machinery Company) for amount due."

The appeal sought to be taken herein is from the above quoted order.

MOTION.

Now comes M. Ducasse, appellee in the above entitled proceedings, and moves that the appeal filed herein, notice of which appeal was filed in the District Court on June 26, 1939, by John O. England, Trustee in Bankruptcy in the Estate of Adrien Blanquie, doing business as City of Paris Dyeing & Cleaning Works, be dismissed on the following grounds:

1. That the Court lacks jurisdiction to entertain this appeal for the reason that the order of the District Court from which an appeal is sought to be taken is an interlocutory order made in a controversy arising in proceedings in bankruptcy.

2. That said lack of jurisdiction appears from the statement of points upon which appellant intends to rely upon appeal filed herein, as well as the appellant's statement of case and specification of error contained in brief of appellant on file herein.

3. That the said interlocutory order of the District Court from which an appeal is sought to be taken is not one from which an appeal lies.

Wherefore, appellee M. Ducasse prays that said appeal be dismissed with costs.

Dated, San Francisco,
September 15, 1939.

STANLEY JACKSON,
WERNER OLDS,
BERTRAND A. BLEY,
Attorneys for Appellee.

ROBERT E. HALSING,
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Appellant,

vs.

M. DUCASSE,
Appellee.

POINTS AND AUTHORITIES IN SUPPORT OF APPELLEE'S MOTION TO DISMISS APPEAL.

The appeal sought to be taken herein is governed by the provisions of Section 24A of the Bankrupt Law, as amended in 1938, which provides, as follows:

> "Section 24. Jurisdiction of Appellate Courts. a. The Circuit Courts of Appeals of the United States and the United States Court of Appeals for the District of Columbia, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction from the several courts of bankruptcy in their respective juris-

> dictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise or reverse, both in matters of law and in matters of fact: Provided, however, That the jurisdiction upon appeal from a judgment on a verdict rendered by a jury, shall extend to matters of law only: Provided further, That when any order, decree, or judgment involves less than $500, an appeal therefrom may be taken only upon allowance of the appellate court."

That the order of the District Court from which an appeal is sought to be taken herein, is one made in controversies arising in bankruptcy proceedings and not merely in proceedings in bankruptcy, is clearly made to appear in the decision rendered in *Hewit v. Berlin Machine Works,* 194 U. S. 296.

The order of the District Court Judge made herein is an interlocutory, and not a final, order. *Goodman v. Brenner,* 109 Fed. 481.

Prior to the 1938 amendment to the Bankruptcy Act, appeals were permitted from interlocutory orders in controversies in bankruptcy proceedings only in such cases where appeals were permitted in civil actions generally, under the provisions of the Bankruptcy Act as it stood prior to the 1938 amendments thereto, and there is nothing in the 1938 amendments, particularly as they affect Section 24 (a) and (b) and Section 25 of the Act to show that Congress intended to increase, in controversies, the jurisdiction of the Circuit Court of Appeals. (Attention is called to the scholarly discussion upon the foregoing subject appearing in Collier-Bender Pamphlet Edition, Bankruptcy Act, published in 1938, page 68, et seq.)

Since, therefore, an appeal will lie from an interlocutory order herein only if the appeal generally is allowed from such an interlocutory order, Section 129 of the Judicial Code (28 U. S. C., Paragraph 227) providing as follows, necessarily controls:

> "227. (Judicial Code, Section 129, amended) Appeals in proceedings for injunctions and receivers. Where, upon a hearing in a district court, or by a judge thereof in vacation, an injunction is granted, continued, modified, refused, or dissolved by an interlocutory order or decree, or an application to dissolve or modify an injunction is refused, or an interlocutory order or decree is made appointing a receiver, or refusing an order to wind up a pending receivership or to take the appropriate steps to accomplish the purposes thereof, such as directing a sale or other disposal of property held thereunder, an appeal may be taken from such interlocutory order or decree to the circuit court of appeals; and sections 346 and 347 of this title shall apply to such cases in the circuit courts of appeals as to other cases therein. The appeal to the circuit court of appeals must be applied for within thirty days from the entry of such order or decree, and shall take precedence in the appellate court; and the proceedings in other respects in the district court shall not be stayed during the pendency of such appeal unless otherwise ordered by the court, or the appellate court, or a judge thereof. The district court, may, in its discretion, require an additional bond as a condition of the appeal.
>
> "In all cases where an appeal from a final decree in admiralty to the circuit court of appeals is allowed an appeal may also be taken to said court from an interlocutory decree in admiralty determining the rights and liabilities of the par-

ties: Provided, That the same is taken within fifteen days after the entry of the decree: And provided further, That within twenty days after such entry the appellant shall give notice of the appeal to the appellee or appellees; but the taking of such appeal shall not stay proceedings under the interlocutory decree unless otherwise ordered by the district court upon such terms as shall seem just. (As amended Apr. 3, 1926, c. 102, 44 Stat. 233.)"

That the interlocutory order of the District Court from which an appeal is herein sought to be taken is not one from which an appeal lies conclusively appears from the decisions rendered in *Pierce v. National Bank of Commerce,* 282 Fed. 100, and *Schumaker v. Security Life and Annuity Co.,* 159 Fed. 112.

It is respectfully submitted that the appeal sought to be taken herein will not lie and that it should be dismissed with costs.

Dated, San Francisco,
September 15, 1939.

STANLEY JACKSON,
WERNER OLDS,
BERTRAND A. BLEY,
Attorneys for Appellee.

ROBERT E. HALSING,
Of Counsel.

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M. DUCASSE,
Appellee.

BRIEF FOR APPELLEE.

The following brief is filed without prejudice to the right of appellee to make the foregoing motion to dismiss appeal.

STATEMENT OF CASE.

Appellant's statement of case is substantially correct with the following two exceptions:

1. M. Ducasse at no time attempted to "vary" or "contradict" his own books of account by oral testimony as stated by appellant, but he did attempt to "explain" them.

2. Appellant states that the question involved upon this appeal "relates to the erroneous ruling of the District Court referring the case to the Bankruptcy Referee * * *." (Brief of Appellant, page 3.)

It is submitted that appellant's statement that the ruling is an erroneous one is there prematurely made and is not properly included in the statement of facts.

POINTS AND AUTHORITIES.

I.

BOOKS OF ACCOUNT ARE THE BEST EVIDENCE OF WHAT THEY CONTAIN—BOOKS OF ACCOUNT ARE NOT THE BEST EVIDENCE OF THE TRANSACTION REFLECTED BY SAID BOOKS OF ACCOUNT AND PAROL EVIDENCE TO EXPLAIN BOOKS OF ACCOUNT IS ADMISSIBLE, WHEN THE TRANSACTION IS THE MATTER IN CONTROVERSY.

The first statement hereinabove made under Points and Authorities is the one made by appellant and to prove the correctness of it appellant devotes many pages of his brief and states many authorities. This was entirely unnecessary as appellee freely admits that it correctly states the law, but appellee also insists that that rule of law is entirely inapplicable on this appeal.

The second statement hereinabove made under Points and Authorities is the correct statement of the law involved on this appeal; in other words, the prob-

lem is not how may the contents of books of account or ledger sheets of M. Ducasse, appellee, be proved, but what evidence is admissible to show how much is owed by the bankrupt to appellee under a conditional sales contract.

On the hearing on appellee's petition for reclamation before the Referee in Bankruptcy proof of the amount owing to appellee under said conditional sales contract was sought to be elicited by appellee's attorneys from both M. Ducasse, the proprietor, and O. M. Grimm, office manager, of their own knowledge. (Tr. 17, 18 and 19.) The ledger sheets were introduced in evidence only when the Referee refused to permit said M. Ducasse or said O. M. Grimm to testify from their own knowledge as to the amount due. (Tr. 20.)

On page 5 of his brief appellant cites *Jones Commentaries on Evidence,* Volume 2, page 1421 (2nd Ed.) and quotes the first sentence of Paragraph 767 which reads as follows:

> "Books of Account. Where reference is made in the evidence, and it is sought to introduce evidence of the contents of books of account, such books are ordinarily the best evidence within the meaning of the rule, and parol evidence as to the matter in question is inadmissible against proper objection."

Here again is stated the proposition of law which admittedly is correct. But this one sentence is not all that there is said on the subject of "books of account" the title of the paragraph. The following also appears immediately after the quoted sentence:

"The question in such cases, however, is as to the nature of proof available. If it is impracticable to prove the fact in issue directly, and only the contents of the books as reflecting the fact are available, it appears from the more discriminating authorities that the best evidence rule applies as in all other cases where the attempt is to prove the contents of a writing. But where, on the other hand, the transaction is otherwise directly evidenced or is independently recollected by an available witness, the books are only on the same plane with such other evidence. In such latter cases the best evidence rule does not apply to exclude parol or other direct evidence as secondary to the books, for there is no attempt by such evidence to prove the contents of the books, the contents of the books being simply other evidence to the same point.

"A person having knowledge of the sale of a chattel, and the amount paid or agreed to be paid for it, is a competent witness to the fact, although he may have recorded in his books of account a memorandum of the sale. Indeed, books of account have always been regarded as a species of secondary evidence, admissible in favor of the party keeping them because of the necessities of the case, not because they are the best evidence of the transactions recorded in them. The fact that certain entries have been made has never been held to preclude the testimony of a person having knowledge of the facts, and able to testify to them from memory. * * * Where books are offered in evidence and are available to the parties, oral proof may be given of entries in them * * *."

And Section 768 at page 1425 of the same text contains the following:

> "Limitations and Distinctions. The distinction noted in the preceding section, with regard to the application of the rule to books of account, is to be noted throughout in the application of the rule. Where direct testimony or evidence is available with regard to a fact in issue, and such fact is not required by law to be evidenced by writing or by a particular form of writing, and the fact, as a matter of evidence or of substantive law, is not legally merged in the writing, the mere existence of a writing appertaining to the fact does not make such writing primary evidence thereof. It is only where the parol or other evidence offered is as to the contents of the writing, or, in other words, where the attempt is to prove the fact by proving the contents of the writing other than by producing the original, that the best evidence rules applies. The rule is often imposed by legal intendent, as where the terms of a contract have been reduced to writing and the law conclusively implies that such writing was intended to stand as primary evidence. But in the absence of such a legal intendment, the application of the rule depends upon evidence available and whether the attempt is to prove the fact indirectly by proving the contents of a writing without producing it, or whether it is sought by competent evidence to prove the fact independently of the writing and without regard to its existence."

Starting then with the rule of law stated in the text cited by appellant to the effect that books of account are not the best or only evidence of the transaction

reflected by such books of account, but that one who knows the facts may testify to such facts, we turn to the authorities.

The cases with practical unanimity sustain the proposition advanced by appellee that books of account are not the best or sole evidence of the transaction reflected in them.

The first case to which we will call the Court's attention is that of *Maguire v. Cunningham,* 64 Cal. App. 536, at page 549. The following language was there used by the Court:

> "Entries in books of account are never the best evidence in the sense that they are primary to the testimony of men who have participated in events of which a record has also been made in the books, nor are they primary to the testimony of third parties who have witnessed the occurrence of the events. In truth, upon the basic principles of evidence it is the testimony of the actors in any occurrence, or of those who see their acts or hear their words, which is primary to any record kept in books."

The foregoing language was used by the Court in holding that the objection to oral testimony covering matters appearing in company books was properly overruled.

An important and often cited case on the question here involved is that of *Cowdery v. McChesney,* 124 Cal. 363, at page 365; the Court said:

> "The only way an account can be proved ordinarily, is by establishing by evidence the several

> items of the same, and the oral evidence of persons having personal knowledge, of the transactions is the best evidence of the items, unless there is something to indicate that such items accrued in pursuance of, or are the result of, a written contract between the parties. The fact that one or both of the parties have kept a book account of their transactions does not affect the rule of evidence, and the oral testimony of eye and ear witnesses to the transaction in which the various items of an account accrued is still primary and not secondary evidence of such items. The books themselves are secondary or supplementary evidence."

In the case of *Argue v. Monte Regio Corp.,* 115 Cal. App. 575 at page 577, the Court quoted from *Cowdery v. McChesney,* supra, and re-affirmed the principle that "The oral evidence of persons having personal knowledge of the transactions" is "the best evidence of the items".

In *Bushnell v. Simpson,* 119 Cal. 658, at page 661, the Court made the following exposition:

> "At the time when parties to an action were not competent witnesses in their own behalf, their books of account were admitted in evidence upon a proper showing of the mode in which they had been kept, and were treated as original evidence of the matters for which they were introduced; but, since parties have been allowed to testify concerning all the facts for which the books were formerly offered, their testimony in reference thereto constitutes primary evidence of these facts, and the books of account become merely secondary or supplementary evidence."

The Court had no doubt in its mind on the question of law under discussion in rendering its decision in *Schurtz v. Kerkow,* 85 Cal. 277, and at page 279 used the following language:

> "While the books were admissible evidence on the issue of profits they did not exclude other evidence. If the defendant or other witness *knew* any thing about those profits he should have been allowed to tell it."

In *Bailey v. Hoffman,* 99 Cal. App. 347, at page 349, in discussing books of account the Court said:

> "But, it will not be controverted that the parties were entitled to explain the account by the introduction of evidence regarding the circumstances under which it was made and the matter to which it related. (Civ. Code, sec. 1647.)"

From the foregoing citations of text and authorities appellee believes that the following correctly states the law:

Even though a transaction is entered in books of account or ledger sheets if there are persons who of their own knowledge know of the terms and form of the transaction or the amounts paid thereon or due thereunder their testimony as to the terms and form of the transaction and the amounts paid thereon or due thereunder is admissible in evidence and is in fact the best evidence thereof. Where it is sought to prove what books of accounts show, quite naturally the books themselves are the best evidence.

It is respectfully submitted that this appeal involves the former question and not the latter in that

the fact sought to be proved by appellee on the hearing before the Referee in Bankruptcy was: What amount is still owing to him from the bankrupt and not what his books of account or ledger sheets showed the balance to be.

II.

BOOKS AND RECORDS OF APPELLEE ARE ADMISSIONS AGAINST HIS INTEREST.

Under this heading appellant has written some six pages of brief. Appellee is perfectly willing to grant appellant that books and records may be used as admissions against interest of the party keeping the books. Just how this proposition enures to appellant's benefit on this appeal is not readily seen. The most that appellant can gain thereby is that after appellee has been permitted to show the actual amount still owing to him from the bankrupt the appellant would be entitled to introduce in evidence the books of account of appellee and in so far as these books might show a lesser sum due without a proper explanation thereof appellant would be entitled to have the Court decide which amount properly is owed by appellee. In other words, the question involved on this appeal is how may appellee prove the amount owing to him and not what proof has he been able to make to the Court.

III.

DEDUCTION FOR INCOME TAX PURPOSES.

This is the third and final subject discussed in appellant's brief. It is earnestly submitted that at this time no question properly arises as to the correctness or validity of deductions that may have been made by appellee in the keeping of his accounts, that matter is collateral entirely and in no way affects the point in issue. We reiterate the question is one of evidence and not of substantive law. Further, should such deduction be found not justified, the only result can be that the proper constituted authorities may take steps to correct any unjustified deductions but such deductions cannot in any way be used as an estoppel against appellee or in any manner change the amount actually still owed to appellee by the bankrupt in whose shoes the appellant trustee stands.

CONCLUSION.

In conclusion appellee respectfully submits that the ruling of the Referee in Bankruptcy denying appellee the right either to prove the amount still owing to him by the testimony of those who knew the facts, or to explain the ledger sheets, was erroneous; that the order of the District Court Judge re-referring the matter to the Referee for the purpose of permitting appellee to explain his ledger sheets and show the amount actually due was correct.

It is further respectfully submitted that appellant's brief herein contains not one citation or argu-

ment pertinent or relevant to the question involved on this appeal.

Wherefore, appellee prays that the decision of the District Court made and entered on the 19th day of April, 1939, be affirmed with costs to appellee.

Dated, San Francisco,
September 15, 1939.

Respectfully submitted,

STANLEY JACKSON,
WERNER OLDS,
BERTRAND A. BLEY,
Attorneys for Appellee.

ROBERT E. HALSING,
Of Counsel.